

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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PHILLIP JEROME GARDNER,

Plaintiff,

- against -

MS. C.O. RIVERA, Shield # Unknown,
MR. SGT. ROSADO, Shield # Unknown,
MR. SGT. SEMMEL, Shield # Unknown,
MR. LIEUTENANT REILLY, Shield # Unknown,
and MR. JAMES WALSH, Superintendent,

Defendants.
-----x

DOUGLAS F. EATON, United States Magistrate Judge.

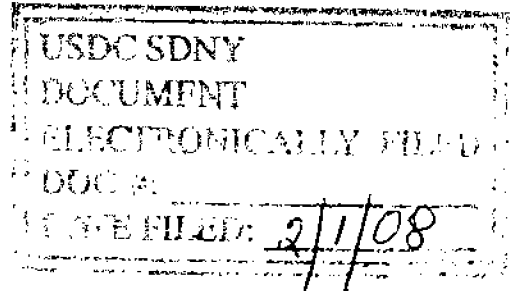
1. On January 31, 2008, I held a telephone conference with Mr. Gardner, with AAG Inna Reznik present in my chambers. The discussion included the following.

2. On November 1, 2007, AAG Reznik made a dismissal motion to Judge Marrero on behalf of the three defendants who had been named and served at that point (defendants Rivera, Rosado and Walsh).

3. On November 13, 2007, Mr. Gardner mailed an Amended Complaint, which, in essence, incorporated the original complaint's allegations and merely amended the original complaint's caption by identifying the two "John Doe" defendants as Sgt. Semmel and Lt. Reilly.

4. During the January 31, 2008 conference, I told Mr. Gardner that the court records showed no document from him opposing the 11/1/07 dismissal motion. He replied that he had written an opposition in early December and had addressed it directly to Judge Marrero. (He admitted that he had not sent any copy to AAG Reznik, and he said that he had not retained any copy of his opposition.) I told him that I had just verified with Judge Marrero's law clerk that no such opposition has ever been received by Judge Marrero's chambers.

5. I told Mr. Gardner that the dismissal motion will probably be granted on default unless he prepares a new



07 Civ. 5653 (VM) (DFE)

MEMORANDUM AND ORDER

This is not an ECF case

opposition and mails it to Judge Marrero no later than February 22, 2008, along with a certification that he is mailing a true copy to AAG Resnik (her address appears on the last page of this 2/1/08 Memorandum and Order). I hereby direct AAG Resnik to serve and file any reply papers by March 6, 2008.

6. Mr. Gardner told me that he has "misplaced" his copy of AAG Resnik's 11/1/07 motion papers. I believe that Mr. Gardner (who has filed many lawsuits) has frequently claimed that he has "misplaced" papers after receiving them. I base my belief upon information received from the staff attorneys of the Pro Se Office; they say that in the past month they have twice sent him a complete "service package" for him to forward to the Marshal's Office, and that he claimed to have "misplaced" both of those packages. Similarly, his 1/2/08 letter to me said that he "lost" the AAG's name and address. In my 1/31/08 conference, I told Mr. Gardner that I will not require AAG Resnik to send him another copy of her motion papers. I told him that he ought to concentrate on trying to write some sort of counter-argument to Point II of her memorandum of law, and specifically her argument that his Complaint **fails to allege that the interference** with his legal mail **actually prejudiced him** in his underlying lawsuit. I told him that it seems unlikely that he could make such an allegation in good faith, given that no such prejudice has been alleged by O'Melveny & Myers, which represents him *pro bono* in the underlying case, *Gardner v. State of New York, et al.*, 04 Civ. 4675, already scheduled for trial before Magistrate Judge Freeman.

7. To assist Mr. Gardner, I am enclosing for him a copy of pages 12-14 of AAG Resnik's 11/1/07 memorandum of law (i.e., its Point II). I am also enclosing for him a copy of two of the court decisions cited in the middle of page 13, namely *Cancel v. Goord*, 2001 U.S. Dist. LEXIS 3440 (S.D.N.Y. Mar. 29, 2001) (McKenna, J.); and *Davis v. Goord*, 2003 U.S. App. LEXIS 13030, officially reported at 320 F.3d 346 (2d Cir. 2003). I am also enclosing a copy of *Standley v. Lyder*, 2001 WL 225035 (S.D.N.Y. Mar. 7, 2001) (Lynch, J.), which has a particularly clear discussion.

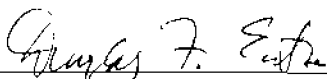
8. In my Memorandum and Order dated December 14, 2007, at ¶4, I gave Mr. Gardner a deadline of March 14, 2008, to send me proof of service (or good reasons for failure to make service) on Sgt. Semmel and Lt. Reilly. I hereby cancel that deadline, and I will wait until Judge Marrero rules on the 11/1/07 dismissal motion. If his decision allows Mr. Gardner to proceed with this lawsuit, then Mr. Gardner may write to me and advise whether he still wants to include Sgt. Semmel and Lt. Reilly as defendants.

9. By letters to me dated December 19, 2007 and January 2, 2008, Mr. Gardner asks me to appoint counsel for him in the case at bar. Both letters annex a copy of a 3/17/06 letter to him from a prison social worker, who states:

This letter in regards to the Mental Health Information that you seek. Your current Diagnosis is Schizoaffective Disorder (295.70). You also have a secondary Diagnosis [of] Antisocial Personality Disorder (301.7). Your current medications are Abilify 15 mg po am for Psychosis, Paranoia and Auditory Hallucinations. Zoloft 100 mg po am for Depression. Trazadone 50 mg po pm for Depression.

.... Your condition is chronic and there is a high probability that you will need to be on medication therapy as well as verbal therapy for the remainder of natural life.

I accept those statements as true, and I am sympathetic to Mr. Gardner's problems. In his January 2, 2008 letter, he says that he "can't concentrate." I am not sure about that; in my January 31 telephone conference, I found him to be lucid and able to concentrate. Most importantly, I find that the claims in the case at bar have no substance, and therefore I deny his request for appointed counsel. He is fortunate to have O'Melveny & Myers in his case before Judge Freeman, but that firm has exercised its right to decline to represent him in the case at bar (07 Civ. 5653).


DOUGLAS F. EATON
United States Magistrate Judge
500 Pearl Street, Room 1360
New York, New York 10007

Dated: New York, New York
February 1, 2008

Copies of this Memorandum and Order are being sent on this date by mail to:

Phillip J. Gardner
(#00-A-1955)
Great Meadow Correctional Facility
Box 51
Comstock, NY 12821-0051

(I am enclosing, for Mr. Gardner, copies of: AAG Resnik's
11/1/07 memo of law, pages 12-14; *Davis v. Goord*; *Cancel v.*
Goord; and *Standley v. Lyder*)

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New York, NY 10007

(Courtesy copy to Mr. Gardner's attorneys in 04 Civ. 4675:)

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